



POLICE DEPARTMENT

April 9, 2018

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In the Matter of Charges and Specifications :

- against - :

Detective Frank Cirminello :

Tax Registry No. 929897 :

49 Precinct Detective Squad :

Case No.

2016-16650

-----X
At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:

Anna Krutaya, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent:

James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, NY 10279

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

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CHARGES AND SPECIFICATIONS

1. Said Detective Frank Criminello,¹ while assigned to the 49th Precinct, while on duty, on or about July 23, 2015, failed to make accurate and concise entries in Department records, to wit: Said Detective entered inaccurate information into the narrative portion of a Complaint Follow-up Informational report.

P.G. 203-05, Page 1, Paragraph 4 – PERFORMANCE ON DUTY – GENERAL

2. Said Detective Frank Criminello, while assigned to the 49th Precinct, while on duty, on or about July 23, 2015, failed to prepare an Omniform Complaint Revision after receiving additional information, which would have affected the crime classification change.

P.G. 207-09, Page 1, Paragraph 1a – FOLLOW-UP INVESTIGATIONS OF COMPLAINTS ALREADY RECORDED

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on January 3 and 18, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges.

The Department called Mohamad Kamara and Lieutenant Michael Brill as witnesses.

Respondent called Captain Dennis O'Brien as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent **Guilty**. The Court recommends that Respondent's penalty be the forfeiture of 10 vacation days.

FINDINGS AND ANALYSIS

The following is a summary of the general facts in this case. On June 29, 2015, at approximately 1850 hours, Mohamad Kamara was working as an asset protection officer at a

¹ Respondent's name is misspelled in the specifications.

Rite Aid store on Boston Road in the Bronx. Kamara was walking around the store when he observed an unidentified teenage female and two unidentified teenage males, congregating in the medicine aisle. The tribunal has named the latter as UM-1 and UM 2. UM-1 is depicted in the store surveillance videos (Dept. Ex. 1, three video clips) as wearing jean shorts, a black T-shirt, a backward fitted black hat, and holding a skateboard (video 2 at 00:38-00:55, 01:56). UM-2 is depicted as wearing jean shorts, a striped T-shirt, a large tan backpack, and holding a skateboard (video 2 at 00:38-00:55, 01:52) (Tr. 122, 124, 134-35, 165).

Kamara found the conduct of the teens suspicious and stopped to take a closer look. He observed the female suspect pick up cold medicine and place it in her front shirt pocket. Kamara walked to front of the store and waited to confront her near the exit (Tr. 122, 124-26, 130-32, 135; video 1 at 01:58-02:13; video 3 at 00:33-00:47).

Shortly thereafter, the female suspect made her way to the front of the store accompanied by UM-1, UM-2, and two additional unidentified teenage males, UM-3 and UM-4. UM-3 is depicted wearing a light blue jersey, beige pants, a fitted hat, and holding a skateboard (video 1 at 03:34-03:36; video 3 at 01:02-01:04). UM-4 is wearing jeans, a black sweatshirt, a fitted black hat, and holding a skateboard (video 2 at 02:14; video 3 at 00:44-00:46). When the female suspect attempted to leave the store, Kamara stopped her and directed her to return the stolen merchandise. She refused to comply and a physical struggle ensued (Tr. 124-26, 130-32, 139; video 3 at 00:48-00:57, 01:00-01:12).

Surveillance footage recorded by Rite Aid store cameras depicts the following:

- Video 3 at 01:12-:25: The female suspect and UM-2 walk to the exit. UM-1, UM-3, and UM-4 surround Kamara. All three are holding skateboards. They take a few steps back, turn around, and close in on Kamara, who is standing in the aisle.
- Video 1 at 03:17-:23: The female stands in the vestibule. UM-2 is scanning the area near the security post.

- Video 3 at 01:27-:33: UM-2 runs into the aisle where the three other male suspects are surrounding Kamara. At 01:30, UM-3 walks to the interior door.
- Video 1 at 03:33-:36: The female suspect is standing in the vestibule and holding the interior door open. UM-3 walks to the exit and knocks over a pile of merchandise located near the security post.
- Video 3 at 01:34-:57: UM-4 and UM-2 walk to the interior door. UM-1 is walking behind them. UM-1 knocks over a pile of shopping baskets and continues walking. At 01:36, Kamara picks up a shopping basket and tosses it at UM-1. At 01:40, UM-1 turns around, picks up a shopping basket, and charges at Kamara. UM-1 is depicted holding the shopping basket with his left hand and the skateboard with his right. At 01:48, UM-1 takes a few steps back and walks to the exit. At 01:51-:57, four female employees are watching the incident unfold. One female, who is standing by the registers, is on the phone.
- Video 1 at 03:40-:47: UM-4 walks through the interior door and stands in the vestibule. UM-2 is standing directly in front of the interior door and holding two skateboards. At 03:47, UM-3 and UM-4 throw water bottles from the vestibule into the store.
- Video 3 at 01:53-02:07: Kamara picks up a shopping basket and tosses it at UM-1. The basket hits UM-1 from behind (see also video 1 at 3:55). At 1:56, UM-1 runs back into the store and charges at Kamara with his arm cocked back, holding a skateboard. UM-2 and UM-3 run into the store to aid UM-1. At 02:02, UM-2 and UM-3 walk to the interior door. UM-1 is facing Kamara with his back toward the cash registers. UM-1 has his skateboard raised at chest level. At 02:07, Kamara throws a shopping basket at UM-1.
- Video 1 at 04:05-:16: UM-3 walks through the interior door that is being held open by the female suspect. UM-2 is standing in front of the doorway holding a skateboard in each hand. At 04:10, UM-2 raises one of the skateboards above his head. At 04:11, UM-3 wields his skateboard and strikes the interior glass door and the glass shatters. At 04:16, the female suspect walks through the exterior door and leaves.
- Video 3 at 02:13-:33: Kamara picks up a shopping basket and swings it above his head. UM-1 runs off to the side and takes cover. At 02:18-:24, UM-1 runs past Kamara, holding his skateboard down at his side. He then swings the skateboard and strikes Kamara in the head. UM-1 then runs through the interior door. Kamara follows after UM-1. At 02:30-:33, a female employee walks to the interior door and appears to be on the phone.
- Video 1 at 04:27-04:46: All four male suspects run through the interior doors into the vestibule. UM-2 and UM-4 run out of the store. UM-1 and UM-3 remain in the vestibule. At 04:30, UM-1 wields his skateboard and smashes the interior glass door. UM-3 is the last suspect to exit the store. At 04:40, Kamara walks over to the interior door with one hand placed on the back of his head. At 04:46, Kamara and a female employee walk through the double doors and exit the store.

- Video 1 at 10:49-11:02: Two male police officers in uniform are accompanied into the store by a female employee. At 11:02, a female officer, in uniform, enters the store (Tr. 131-39, 152-53).

Following the incident, Kamara exited the store and observed the suspects running south on Boston Road. Shortly thereafter, plainclothes officers from the 49 Precinct's anticrime unit arrived at the store. Kamara provided these officers with a brief description of the suspects and relayed the direction in which he saw the suspects run. Anticrime performed a canvass that yielded negative results (Tr. 64, 127-28, 132).

At 1904 hours, patrol supervisor Sergeant Richard Wasley, Police Officer Ray Dutton and Police Officer Casey Quinn arrived at the store. Wasley spoke to Kamara about the incident in question. Wasley then directed Quinn to prepare two complaint reports (Tr. 36-38, 128; video 1 at 10:49-11:02). The first complaint was classified as assault in the third degree, as committed against Kamara, and stated in relevant part:

At T/P/O C/V stated that three dark skinned males, and one dark skinned female walked into Rite Aid, and started knocking items off the shelves. C/V further states the defendants hit the front door store window with a skateboard, smashing the windows, *and C/V got hit in the head with the skateboard, unintentionally, while trying to stop the defendants.* The defendants fled southbound on Boston Road. Incident is on store videotape. Canvass conducted with negative results (Court Ex. 1, emphasis added).

The second complaint was classified as criminal mischief in the fourth degree as against Rite Aid Corporation (Court Ex. 2). The two complaints were referred to the 49 Precinct Detective Squad for further investigation (Tr. 147).

Respondent was assigned to the 49 Squad and was assigned to investigate the complaints on June 30, 2015. Respondent obtained the surveillance footage from the store and reviewed it. (Tr. 79, 148-49, 150-53). He also conducted a follow-up interview with Kamara. Respondent

documented the results of this interview in the Complaint Follow-Up Informational Report (DD-5), dated August 16, 2015, which read:

Mr. Kamara stated that he works as a security guard at Rite Aid and was working on 06/29/2015 at approximately 1900 hours when a group of kids entered the store. *He stated that he believe[d] that one of the individuals was attempting to shop lift and as he approached him, his 3 other friends began to yell and run around the store.* He stated that the initial individual attempted to get away from him a small struggle ensued. *He stated that as this individual got away he was hit with the individuals skateboard unintentionally struck him in the back of the head.* When this individual exited the store, he swung his skateboard at the front glass door, shattering it (Court Ex. 3, emphasis added).

Sometime after this interview, Respondent had Kamara come to the stationhouse to review photos of possible suspects, with negative results. On August 21, 2015, Respondent closed the case as C-4, all leads exhausted (Tr. 81, 128-29, 162-64).

In July and October of 2015, the Quality Assurance Division received two anonymous allegations of improper crime reporting by unidentified members assigned to the 49 Precinct. QAD reviewed and investigated randomly-selected complaints prepared by officers in the 49 Precinct. QAD ultimately determined that Complaint Report No. [REDACTED] (CX 1) was misclassified based on statements made by Kamara during a re-interview with a QAD auditor. QAD found that the complaint should have been upgraded to robbery in the second degree on the grounds that Kamara reported that the suspects used force to steal property from the store (Tr. (Tr. 21, 27-31, 57-58).

Lieutenant Michael Brill of QAD commenced a separate investigation into the subject complaint. As part of the investigation, Sergeant James Blando interviewed Kamara. During this interview, Kamara reiterated that the suspects used force to steal merchandise from the store.

Kamara asserted that he reported these details to the officers investigating the complaint (Tr. 27, 31-32, 91-92).

Brill also conducted official Department interviews of the two responding officers, Dutton and Casey, and the patrol supervisor, Wasley. During his interview, Wasley asserted that he could not recall whether Kamara had reported stolen property. He also gave no indication that Kamara had used the word "unintentional" to describe the manner in which he was struck during the incident. Wasley rather surmised that Kamara was hit while the suspects were fleeing the store. Charges and specifications were brought against Wasley for directing Dutton and Casey to prepare an inaccurate narrative in the complaint report. He pleaded guilty and forfeited 10 vacation days as a penalty (Tr. 33, 36-40; *Case No. 2016-16649* [Aug. 24, 2017]).

In the course of QAD's investigation, Brill became aware of the follow-up investigation into the misclassified complaint. He reviewed the DD-5 prepared by Respondent. He noticed that the report failed to include any reference to stolen property. He also found significant Respondent's use of the word "unintentional" to describe the manner in which Kamara was struck (Tr. 40-41).

Based on that, Brill conducted an official Department interview of Respondent. During this interview, Respondent claimed that he never was informed that property had been stolen. Respondent also asserted that he deferred to using the word "unintentional" based on Kamara's inability to identify the assailant (Tr. 43-44).

In dispute for the first specification is whether Respondent accurately summarized the results of his interview with Kamara in the DD-5. The question here is whether Respondent should have realized, after speaking to Kamara and watching the surveillance videos, that the

striking of Kamara in the back of the head was not "unintentional." The Court finds that Respondent should have realized this.

In dispute for the second specification is whether Respondent erred in failing to upgrade the crime classification for the complaint report to robbery in the second degree, Penal Law § 160.10 (2)(a), forcibly stealing property and causing physical injury to a non-participant in the course of or flight from the crime, or assault in the second degree, Penal Law § 120.05 (2), causing physical injury by means of a dangerous instrument, or (6), in the course of or in furtherance of a felony or attempted felony, or immediate flight therefrom, causing physical injury to a non-participant. Central to these issues is whether Respondent knew or should have known that one or more of the suspects involved in the incident used force to steal merchandise from the store. The Court finds that Respondent did know or should have known force was used to steal property here. Consequently, the crime classification should have been upgraded.

Kamara testified that he observed an unidentified teenage female, accompanied by two unidentified teenage males, standing in the medicine aisle. He observed the female suspect conceal cold medicine in her shirt pocket. Kamara confronted the female in the front of the store as she attempted to leave with the merchandise. He told her to return the merchandise and she did not comply. Kamara persisted in demanding the return of the merchandise, at which point one of the male suspects told him, in sum, "No, no, you going to let her go" (Tr. 124-26, 130-32, 134-35, 139).

Kamara furthered that when he attempted to detain the female suspect, the male suspects "put up fight with me, and one of them hit me with the skateboard." Kamara observed the suspect that hit him standing in the aisle with the female at the time she concealed the merchandise. Kamara testified that the same male suspect hit him in the head at least two more

times. He was adamant that this suspect hit him in the head before the glass doors were smashed. He also indicated that he sustained a cut on his head and was bleeding. He went to the hospital where his skull was checked for injury, but the staff found "nothing wrong with the skull, just a little bit cuts here" (Tr. 126-27, 138-40).

Kamara testified that the female suspect fled the store with the stolen merchandise. He maintained that he relayed this information to the responding officers. He also denied using the word "unintentional" to describe how he was hit when discussing this incident with police. Kamara recalled that he received a telephone call from an officer at the precinct a few weeks after the incident. He told the officer "the same thing that happened," including that the female placed the medicine in her pocket. Kamara also went to the precinct to look at photographs of possible suspects, with negative results (Tr. 125, 127-30, 135-37).

Respondent provided a different account of what Kamara told him. Respondent testified that he conducted an in-person interview of Kamara, at Rite Aid, on July 23, 2015. Kamara stated that he observed some kids in the back of the store in the medicine aisle. He thought they were attempting to shoplift, he approached, a scuffle ensued, and then he got hit in the back of the head with what he believed was a skateboard. Respondent testified that he did not pose any follow-up questions to ascertain what Kamara observed that led him to believe the suspects were attempting to shoplift. He further acknowledged that he did not show Kamara the surveillance footage. Respondent denied that Kamara told him that property actually was removed from the store (Tr. 151-52, 156-58, 160-61, 165, 184-87, 202, 210-11).

Respondent could not recall whether Kamara specifically stated that he believed the suspects were going to shoplift, or whether he had inferred that based on what was relayed

during the interview. Respondent conceded that Kamara unequivocally stated he was hit with a skateboard (Tr. 201-03).

Respondent was asked to describe what information he included in the narrative portion of the DD-5 specific to his interview with Kamara (Tr. 165). Respondent answered:

Sum and substance what he told me that he approached people he believed were shoplifting, he did not see who hit him, and my thinking is I, at that point, *I could not prove intent so I just kind of used the verbiage from the complaint report that he was – that the officers, the sergeant . . . whoever was the one at the scene, used in the complaint report, I just kind of regurgitated onto there.* He never said to me it was unintentional or intentional (Tr. 165-66) (emphasis added).

Respondent acknowledged that he did not confer with the reporting officer before copying the language from the complaint report into the DD-5 (Tr. 183-84).

Captain Dennis O'Brien, the acting commanding officer of the Detective Bureau zone encompassing the 49 Squad, testified that Respondent's work product was consistent and well above standards, that Respondent has a high degree of integrity, and was regarded by supervisors as extremely competent (Tr. 112-13).

Specification No. 1

The evidence demonstrated that Respondent's "regurgitation" of the narrative that Kamara was "unintentionally" struck with the skateboard was inaccurate. Kamara's testimony concerning the reported crime was largely corroborated by the surveillance videos. Respondent conceded that Kamara told him he was hit with a skateboard. He reasoned that this could only prove a skateboard made contact with Kamara's head, and was not a statement that someone intentionally hit him with a skateboard. This is rather dubious in the Court's view. The simple fact is that Kamara told Respondent the suspects were attempting to shoplift, he confronted them,

and in the course of the confrontation he was struck with a skateboard. There is nothing "unintentional" about that.

In any event, Respondent also conceded that he viewed the video surveillance. Video 3 at 1:40-2:25, 1:56 in particular, shows UM-1 raising his skateboard over his head and approaching Kamara to swing it at him. This at the very least demonstrates that Kamara was not "unintentionally" struck with the skateboard. Respondent should not have simply "regurgitated" this language from the complaint report into his DD-5 narrative. There is nothing that supports the use of the word "unintentional" to describe the event. The DD-5 narrative thus was inaccurate and Respondent is found Guilty of Specification No. 1.

Specification No. 2

Respondent testified that while Kamara told him the suspects were attempting to shoplift, Kamara did not say the female suspect placed the item in her pocket. Kamara testified that he did tell Respondent this. This is an important consideration for upgrading the charge to robbery, as a larceny must have occurred for a robbery to be charged. Placing the item in her pocket would be sufficient under the circumstances to constitute a larceny. See People v. Olivo, 52 N.Y.2d 309, 318-19 (1981) (larceny exists in a shoplifting situation when the customer exercises dominion and control over merchandise in a manner wholly inconsistent with the rights of the owner; leaving the physical store is not required).

The Court credits Kamara's statement that he told Respondent the female suspect secreted the item. Respondent testified that he asked Kamara to tell him what happened in his own words (Tr. 156). There is no reason that a retail asset protection officer like Kamara would not have told Respondent what he said at trial: he approached the group of suspects after the female placed over-the-counter cold medicine in her pocket. It is not credible that Kamara

would have limited himself to the offenses listed in the complaint reports. In fact, Respondent's DD-5 narrative has Kamara start out talking about the group attempting to shoplift, and Respondent conceded in his testimony that Kamara told him the same thing.

Thus, Respondent knew or should have known that force was used in the course of a larceny. As noted *infra*, his view that any shoplifting attempt was unconnected to the force used against Kamara and the store is not supported by the evidence. As force was used, and Kamara received a physical injury during the course of the incident, Respondent should have upgraded the charge to robbery in the second degree.

But even if the Court were to find that Respondent was not told this, the Court still finds that he should have upgraded the charge to assault in the second degree.

First, it is undisputed that Kamara was physically injured during the incident. All agree that an assault occurred, and even a misdemeanor assault requires physical injury, Penal Law § 120.00. As noted above, Respondent should have realized that the assault was caused by an intentional use of the skateboard. The skateboard is a "dangerous instrument" under the Penal Law, meaning any object or article that, under the circumstances in which it is used, attempted or threatened to be used, is capable of causing serious physical injury or death, Penal Law § 10.00 (13). Although Kamara did not suffer a serious physical injury (Tr. 78), the suspect swinging the skateboard in the manner seen on the video could have caused protracted impairment of health or protracted impairment of the functioning of bodily organs, Penal Law § 10.00 (10). Thus, the incident could have been upgraded under Penal Law § 120.05 (2).

Second, this incident could have been upgraded under Penal Law § 120.05 (6). This section states that assault in the second degree occurs when, in the course of or in furtherance of a felony or attempted felony, or immediate flight therefrom, the defendant causes physical injury

to a non-participant. There is no requirement that a completed robbery occur in order to charge second-degree assault. See People v. Butler, 187 A.D.2d 439 (2d Dept. 1992). Respondent's view that the attempted shoplifting was completely coincidental to the assault of Kamara or any of the other violent acts is unsustainable. This was not simply, as Respondent testified, "[a] couple of knuckleheads acting stupid" and Kamara "got injured in the scuffle with them" (Tr. 161). In fact, this testimony is contrary to Respondent's narrative from the DD-5, where he stated that the suspects began acting violently when Kamara confronted them for trying to shoplift. Kamara "got injured" because the suspects used force against him in an attempt to help commit a larceny.

Respondent was not the original classifier of the offense. That was done by the patrol supervisor and his subordinates. Respondent nevertheless had an independent obligation, as the investigating detective, pursuant to Patrol Guide § 207-09, p. 1, para. 1a, cited in Specification No. 2, to prepare an Omniform Complaint Revision, i.e., to change the crime classification if additional information was received.

Respondent testified that "maybe in the detective squad we look at things a little differently." His goal was to prepare a case for court purposes, to bring it to the District Attorney's Office or the grand jury (Tr. 155). That is a fine way of operating with other law enforcement partners, but it is the exact opposite of how crimes are supposed to be classified in this Department. For crime classification purposes, it does not matter that no suspect can be identified or arrested, or that an ADA would question whether she wanted to bring it to the grand jury or charge the offense in a different manner. All that matters is that the facts match the Penal Law requirements. Therefore, Respondent is found Guilty of Specification No. 2.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 1, 2002. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Court recommends that Respondent's penalty be the forfeiture of 10 vacation days, as requested by the Advocate. This is a fair and reasonable penalty that balances the importance of accurate reporting and documentation with Respondent's consistently high performance evaluations and lack of disciplinary history. It also is consistent with recent precedent. See, e.g., Case No. 2016-16649 (Aug. 29, 2017) (12-year sergeant, no prior formal disciplinary history, 10 days for causing, as patrol supervisor, inaccurate information to be entered into narrative portion of complaint report); Case No. 2015-14241 (Aug. 8, 2016) (11-year lieutenant, no prior disciplinary history, 10 days for directing subordinate to change crime classification from grand larceny to lost property); Case No. 2013-10908 (Mar. 22, 2016) (10-year police officer, no history, 10 days for improperly classifying crime as petit larceny when it should have been robbery).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

AUG 06 2018

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE FRANK CIRMINELLO
TAX REGISTRY NO. 929897
DISCIPLINARY CASE NO. 2016-16650

Respondent was appointed to the Department on July 1, 2002. He received an overall annual performance evaluation rating of 4.5 ("Extremely Competent/Highly Competent") in 2016, 2015, and 2014. Respondent has been awarded 16 medals for Excellent Police Duty.

[REDACTED]

Respondent has no disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials